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No. 82-192

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

DELTA AIR LINES, INC.,
Petitioner,

vs.

MARGARET THORNBERRY, PATRICIA FARMER, DELORES O'SULLIVAN and LINDA MAGEL, on behalf of themselves and all others similarly situated,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Delta Air Lines, Inc., submits the following reply memorandum in support of its petition for a writ of certiorari in the captioned matter.

I

THE NINTH CIRCUIT BASED ITS ATTORNEY'S FEE OPINION ON ITS RULING THAT THE PLAINTIFFS' FAILURE TO PREVAIL ON MOST OF THEIR CLAIMS WAS IRRELEVANT, NOT UPON ANY FINDING THAT THE PLAINTIFFS "HAD SUCCEEDED ON THE CASE AS A WHOLE" OR THAT THE CLAIMS ASSERTED WERE NOT "FRACTIONABLE"

In their memorandum in opposition to the petition for certiorari, Respondents seek to leave the impression, without directly arguing, that the district court and Ninth Circuit determined that the various claims asserted by the plaintiffs were not fractionable, that Respondents had pre-

vailed "on the case as a whole," and that Respondents' attorneys therefore were entitled to recover for all time spent on the case. They then argue that this approach is consistent with rulings in most of the circuits, including the circuits which clearly have stated that attorneys may not be awarded fees for time spent on issues upon which they did not prevail.

The basic weakness of Respondents' argument, however, is the fact that the district court completely ignored the question of whether the claims asserted by plaintiffs below were "related" or "fractionable", assuming from the outset of its opinion, without any discussion, that plaintiffs were entitled to recover for all time reasonably spent on the case (Appendix B to Petition, at A-20 through A-22); the court then used the admittedly "limited" results only to decide how much the basic award should be *increased* to reflect the contingency of the case (Appendix B to Petition, at A-22 through A-24). The district court engaged in no discussion whatever of Petitioner's argument that hours spent on claims upon which the plaintiffs did not prevail was not a proper basis of an award, and further did not discuss in any fashion whether the claims were "related" or "fractionable". Implicit in the district court's approach is an award of fees for all time spent on a case any time it settles or any time a plaintiff prevails on even one issue, with any analysis of the results obtained being restricted to determining the size of a contingency bonus: a plaintiff who obtains next to nothing, or prevails on only one of many claims, would get 100% of the normal fee for all time spent, while a plaintiff who did better would get a 150%, 175%, or possibly a higher amount. The *least* an attorney would get, however, would be 100% of his hours at his normal rate.

The Ninth Circuit's opinion similarly contains no discussion of the nature of the various claims asserted below or of the extent to which the claims were "fractionable". These issues were deemed irrelevant because the court

found that the claims all involved "gender discrimination" and therefore were "related", making a reduction in the hours for time spent on the issues and claims upon which the plaintiffs had not prevailed inappropriate. (Appendix A to Petition, at A-7.)[1]

This approach to a fee award under Title VII is antithetical to the general rule in several circuits that no fee may be recovered for time spent on issues and claims upon which the plaintiff does not prevail. Contrary to Respondents' arguments, the Ninth Circuit did *not* apply the standards adopted by the First, Third, Seventh and District of Columbia Circuits (indeed, those decisions and the general rule they establish are not even cited), but instead adopted a rule that allows a Title VII claimant to recover a fee award for all time spent on a case, even where he does not prevail on a majority of the claims raised and litigated. This rule conflicts with rulings in other circuits, conflicts with the prevailing party requirement of Title VII's attorney's fee provision, and should be considered by this Court.

Consequently, although review of the various claims raised by Respondents below would show that many, and in fact most, of the claims were indeed "fractionable" (see Appendix G to Petition and *General Tel. Co. of the Southwest v. Falcon*, ... U.S. ....., 77 L.Gd.2d 740, 751, 102 S.Ct. ..... (1982)), the "fractionability" question is not presented to this Court by the present petition. What *is* presented is (1) the Ninth Circuit's determination that no reduction for

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[1]In a recent opinion, published after the case at bar, the Ninth Circuit held in a similar fashion that a number of claims asserted under 42 U.S.C. § 1983 all were "related" because they all involved "civil rights". The court therefore held that no reduction in hours was appropriate even though the plaintiffs did not prevail on all of the claims asserted. *Rivera v. City of Riverside*, 679 F.2d 795, 797 (9th Cir. 1982), petition for certiorari filed on July 27, 1982, 51 U.S.L.W. 3075 (No. 82-156). It is difficult to imagine any claims that would *not* be "related" under the minimal standards the Ninth Circuit appears to be applying to this test.

time spent on claims upon which the Respondents did not prevail is appropriate where the various claims all involve "gender discrimination" and (2) the district court's and Ninth Circuit's automatic allowance of all time reasonably spent on a case regardless of whether the plaintiff prevails on all or most of the claims or whether the claims upon which the plaintiff did not prevail are separate and distinct from the other claims. Although the "fractionability" question might be the proper focus of further inquiry upon remand if the Ninth Circuit's approach is determined to be erroneous, it is not involved in the questions presented by the present petition.[2]

II

RESPONDENTS' POLICY ARGUMENTS IGNORE THE STATUTORY MANDATE THAT FEES BE AWARDED ONLY TO A PREVAILING PARTY

Respondents further argue that attorneys must be compensated for all time spent on a case, regardless of whether they prevail on all or most of the claims advanced, because

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[2]This conclusion applies equally to Respondents' argument that the district court, at one point in its opinion, used the word "significant" in discussing the relief obtained. (Appendix B to Petition, at A-23.) Initially, it is difficult to square this characterization with the fact that the heart of the settlement was a claims procedure which led to a mere handful of claims (48) from the 8,700 member class, none of which resulted in the claimant obtaining any relief. Secondly, even if the relief obtained on several of plaintiffs' claims could be deemed "significant" in relation to the relief sought on those claims, the facts that *no* relief, significant or otherwise, was obtained on the vast majority of claims and issues presented, and that a number of claims admittedly were dismissed by the court during the pendency of the action, remain undisputed. It is the district court's failure to consider the latter facts, and the Ninth Circuit's ruling that they are irrelevant, that is the subject of this Petition. At most, obtaining "significant" relief on one or two claims should entitle the party to recover a fee award for time spent on those claims, possibly with a contingency bonus: it should *not* entitle him to recover for time spent on *other* claims upon which he did not prevail in any fashion.

otherwise the determination of fees could become complicated. They further argue that fee paying clients normally pay for all time spent on a case. (Respondents' Brief, at 30-32.) These arguments, besides being addressed more to the merits of the questions presented than to whether certiorari should be granted, ignore the fact that Congress clearly limited the right to a fee award under Title VII to *prevailing* parties. Although the attorney's fee provisions of Title VII were designed by Congress to compensate a plaintiff's attorney for the time reasonably spent on a matter, the statute's basic assumption is that the plaintiff *prevails* on the matter. On matters (claims) upon which the plaintiff does *not* prevail, Congress did *not* allow a fee award, and as to such matters no fee may be awarded. The statutory limitation to "prevailing parties" simply cannot be ignored by a court in a multiple claim, multiple issue case, where a plaintiff combines a number of different claims against a party and "prevails" on only a few.

From a policy standpoint, allowing fees for all time spent when the plaintiff raises a variety of "gender discrimination" issues and claims and "prevails" on only a few does *not* serve the statutory purpose of encouraging prosecution of *valid* claims and of awarding fees only to "prevailing parties." Instead, such an approach encourages abuse of class action procedures, unfair harassment of employers, and time consuming, expensive exploration of issues with no merit and no discernable benefit. As pointed out in the petition, the approach ill-serves the administration of justice, serves no useful social purpose, and is directly at odds with the prevailing party provisions of the statute. It does nothing more than unjustly enrich attorneys for unnecessarily complicating litigation by the assertion of unmeritorious claims.

The Ninth Circuit's adoption of this approach in the opinion below is contrary to authority in other circuits, raises substantial questions of federal law and policy, and potentially impacts on areas of practice in the federal courts outside the Title VII and employment discrimination area.[3] The propriety of the ruling is a fit and proper subject for this Court's consideration, and the petition for certiorari on the attorney's fee issue should be granted.

III

TITLE VII DOES NOT MODIFY THE SCOPE OF COSTS RECOVERABLE IN LITIGATION UNDER THE ACT EXCEPT FOR ITS ALLOWANCE OF A REASONABLE ATTORNEY'S FEE AS A PART OF THE OTHERWISE RECOVERABLE COSTS

On the second question presented for review in the petition—whether district courts have authority to award as "costs" litigation expenses not specified in 28 U.S.C. § 1920—Respondents simply argue that the attorney's fee provision of Title VII provides authority for such an award and that civil rights cases are subject to different rules than cases arising under other statutes with similar attorney's fee provisions. These arguments simply define the issue presented. As indicated in the petition, they conflict with the statute, with authority in this Court, and authority in other circuits as well.

Title VII's attorney's fee provision simply states that the district court, in its discretion, "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 2000e-5(k). As noted in *Chapman v. Pacific Telephone & Telegraph Co.*, 456 F.Supp. 77 (N.D. Cal. 1978), "[T]here is no special provision in Title VII for

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[3]Indeed, the Ninth Circuit recently applied its theory in an antitrust action arising under the Clayton Act. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1312 *et seq.* (9th Cir. 1982).

costs above those normally taxable under Rule 54(d)." *Id.* at 83-84. Furthermore, as Respondents' attorneys argued below, and as plaintiffs' attorneys frequently have argued in other cases, the Senate Judiciary Committee, in discussing the Attorney's Fee Award Act of 1976, indicated that awards under the Act should be governed "by standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . . ." Senate Report No. 94-1011, 94th Cong., 2nd sess. 6 (1976). In this respect, the Clayton Act has a prevailing party attorney's fee provision nearly identical to that contained in Title VII. 15 U.S.C. § 15. In the antitrust area, however, the courts have held without significant exception that statutes allowing a prevailing party an award of attorney's fees as a part of the costs do *not* allow awards for litigation expenses beyond normal statutory costs. *See, e.g., Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 223-24 (9th Cir. 1964) and other authorities at 13-14 nn. 9, 10 of Petition. That Congress understands the limitations of this type of statute is shown by the attorney's fee provisions of the Clean Air Act, in which Congress grants a more expansive authority to the district courts by allowing them to award the "costs of litigation (including reasonable attorney and expert witness fees)." 42 U.S.C. §§ 7604(d), 7607(f). Failure to include such a clause in Title VII is a clear indication of Congress' intent not to expand the scope of recoverable costs in Title VII actions except for the allowance of a reasonable attorney's fee. Thus, the attorney's fee allowance of the statute does not support an award of expenses beyond statutory costs, neither by its terms, nor by its legislative history, nor by analogy to other, similarly worded statutes.

Respondents' argument that a different rule applies to civil rights cases than to other cases with respect to the recovery of expenses, apart from ignoring the statute and the legislative history, is simply wrong. Initially, the assertion that the petition does not cite any civil rights cases in

support of its legal position (Respondents' Brief 42) is false: at least two cases cited in the Petition are employment discrimination and civil rights cases.[4] Other cases could be cited as well, particularly in the district courts. The latter courts, affected by the split in the circuits, have varied widely in their "cost" awards, most of which are handed down without discussion or explanation. It is the split in the circuits, and the resulting confusion and inconsistent results in the district courts, that justify the grant of certiorari on the cost question.

It also is worth noting, however, that the decisions of the lower court and the Ninth Circuit are not premised on the argument that a different rule applies in civil rights cases than applies under other prevailing party statutes. The district court based its award of non-statutory expenses on its "inherent equitable powers" (Appendix B, at A-29) and its "discretion" (Appendix B, at A-31), not upon the fact that the case was a civil rights or employment discrimination action. The Ninth Circuit likewise affirmed on the basis that, *as a general rule,* it is within the discretion of the trial court to award expert, consultant and other out-of-pocket expenses that are attributable to "the reasonable needs of the party in the context of the litigation," not upon the ground that the recovery of costs under prevailing party statutes in civil rights cases is in some fashion governed by different standards than recovery of costs under identically worded statutes in other areas. (Appendix B to Petition, at A-8 through A-10.) The breadth of the Ninth Circuit's ruling, and its potential impact on litigation outside the Title VII area, are further reasons for granting certiorari on the "recoverable cost" question presented by the petition.

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[4] *Kinsey v. Legg Mason Wood Walker,* 23 FEP Cases 774, 777 (D.D.C. 1978), *aff'd,* 605 F.2d 572 (D.C. Cir. 1979) (Title VII case); *Wehr v. Burroughs Corp.,* 477 F.Supp. 1012, 1022 (E.D. Pa. 1979), *aff'd,* 619 F.2d 296 (3rd Cir. 1980) (action under Age Discrimination in Employment Act).

CONCLUSION

The issues raised in the petition for certiorari present significant questions of federal law and policy and have a direct and substantial impact on practice in the federal courts. They are issues upon which the circuits disagree, causing substantial confusion and conflicting results in the district courts. The questions clearly are worthy of this Court's consideration. Delta's petition for a writ of certiorari therefore should be granted on both issues presented.

Dated: September 16, 1982

Respectfully submitted,

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